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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WALTER L. NIXON, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was removed from office as a federal judge in 1989 following an impeachment trial before a committee of twelve Senators.

1. Whether the refusal of the court of appeals to review a claim that the Senate committee trial is unconstitutional is contrary to the holding in *Powell v. McCormack*, 395 U.S. 486 (1969), disrupts the constitutional balance of powers, and threatens judicial independence.

2. Whether a committee trial on perjury charges, in which eighty-eight members of the Senate are unable to evaluate witness credibility, violates the express constitutional command that the Senate "try all Impeachments."

LIST OF PARTIES TO THE PROCEEDING IN THE U.S. COURT OF APPEALS

WALTER L. NIXON, JR.
Appellant

UNITED STATES OF AMERICA,

JAMES A. BAKER, III,
U.S. Secretary of State,

and RALPH MECHAM,
Director of the Administrative Office
of the United States Courts,
Appellees

UNITED STATES SENATE
Amicus Curiae

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PETITION FOR WRIT OF CERTIORARI

Walter L. Nixon, Jr. hereby petitions for issuance of a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit in *Nixon v. United States*, No. 90-5246, issued on July 9, 1991.

OPINIONS BELOW

The three opinions of the court of appeals (Pet. App. A, at 1a-57a, *infra*) are reported at 938 F.2d 239 (D.C. Cir. 1991). The opinion of the court of appeals denying a petition for rehearing (Pet. App. F, at 84a-85a, *infra*) is unreported. The district court decision affirmed by the court of appeals (Pet. App. B, at 58a-69a, *infra*) is reported at 744 F. Supp. 9 (D.D.C. 1990).

JURISDICTION

The decision of the court of appeals was issued on July 9, 1991. A petition for rehearing was denied on August 5, 1991 (Pet. App. E, at 83a, *infra*). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND SENATE RULE INVOLVED

The following provisions of the Constitution are set out in the Appendix (Pet. App. G, at 86a-87a, *infra*):

Article I, section 2, clause 2

Article I, section 3, clause 6

Article I, section 5, clauses 1 and 2

Article III, section 2, clause 3

Amendment VII

Senate Impeachment Rule XI also is set out, in relevant part, in the Appendix (Pet. App. G, at 87a-88a, *infra*).

STATEMENT

1. The Nixon Investigation Unearthed No Underlying Crimes, But Resulted In A Perjury Conviction

In late 1983, the Federal Bureau of Investigation received an anonymous tip falsely accusing petitioner, then Chief Judge of the U.S. District Court for the Southern District of Mississippi, of accepting a gratuity from Wiley Fairchild to intervene in the state court prosecution of Fairchild's son. *See* Hearings before the Senate Impeachment Trial Committee, S. Hrg. No. 247, 101st Cong., 1st Sess., Pt. 2 at 17, 28, 30; Pt. 3 at 501, 572-73, 1136, 1263; Pt. 4A, Vol. I at 275-299 (1989) (hereinafter cited as Imp. Rec. Pts. 1-13).[1] An FBI investi-

[1] Thirteen volumes, constituting the complete record of proceedings in the Senate Impeachment Trial Committee, the House of Repre-

gation began in April 1984, and during the summer a grand jury was convened on the matter. *Id.* Pt. 2 at 41, 134, 240; Pt. 3 at 1537-39; Pt. 4A, Vol. I at 811-12; Pt. 4B, Vol. I at 449-50.

Nixon immediately demanded to appear before the grand jury. He testified fully and with supporting documentation about his business relations with Mr. Fairchild. *Id.* Pt. 2 at 241, 288, 297; Pt. 3 at 53-98, 432. Nixon also testified that he had never discussed the state court criminal action with the prosecutor, Bud Holmes. *Id.* Pt. 2 at 241, 252, 280-81, 287-88, 316-17; Pt. 3 at 48-106; Pt. 4B, Vol. I at 467-69.

The grand jury indicted Nixon for accepting an illegal gratuity and on three perjury charges. At trial, Nixon's testimony was materially contradicted only by Holmes, who himself had been indicted on five perjury counts but pled guilty to a single charge of contempt of court in return for his testimony against Nixon.

Holmes testified in court that Nixon had approached him to "put in a good word" for Fairchild's son. *Id.* Pt. 4A, Vol. I at 736-37. He further testified that, following Nixon's grand jury appearance, Nixon asked Holmes not to divulge this prior conversation. *Id.* at 764-65. Nixon, however, vehemently denied ever having sought to influence the prosecution of Fairchild's son or to silence Holmes. *Id.* Pt. 4A, Vol. II at 1546-47, 1558, 1570, 1575, 1589-91, 1599-1600. He testified that he had had one brief conversation with Holmes in which he had mentioned the Fairchild case in passing, but that it had occurred after the criminal case had concluded. *Id.* at 1539-40. Nixon also testified that when he appeared before the grand

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sentatives, and the courts (with respect to petitioner's criminal proceedings), were compiled by the Senate Impeachment Trial Committee ("Senate Committee") and transmitted to the Senate. The volumes were marked as Appendix 4 to Plaintiff's Motion for Summary Judgment filed in the district court on February 20, 1990.

jury, none of the questions asked of him brought back his recollection of this conversation. *Id.* at 1592-93; *see also id.* Pt. 2 at 241, 252, 280-81; Pt. 4B, Vol. I at 451.

The jury acquitted Nixon on the gratuity charge and on one of three perjury counts. Nixon was convicted on two charges of perjury for failing to report his conversation with Holmes to the grand jury. *United States v. Nixon*, 816 F.2d 1022 (5th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988).

2. Senate Impeachment Proceedings: Only Twelve Senators Heard The Witnesses In This Perjury Case

On May 10, 1989, the House of Representatives adopted three articles of impeachment against Nixon. H. Res. 87, 101st Cong., 1st Sess. (135 Cong. Rec. H1802-03, 1811) (daily ed. May 10, 1989), *reprinted at* Imp. Rec., *Impeachment of Judge Walter L. Nixon, Jr.*, S. Doc. No. 8, 101st Cong., 1st Sess., 19-25 (1989). The House based the first two articles on Nixon's convictions. Article III charged that in his grand jury testimony, as well as in a tape-recorded FBI interview in April 1984, Nixon made up to fourteen false statements about conversations with Messrs. Fairchild and Holmes.

The articles of impeachment were exhibited in the Senate on May 16, 1989. Shortly thereafter, the Senate adopted Resolution 128, pursuant to Senate Impeachment Rule XI. *See* S. Res. 128, 101st Cong., 1st Sess. 135 Cong. Rec. S5133-34 (daily ed. May 11, 1989), *reprinted at* Imp. Rec., Comm. Report at 97-98. Resolution 128 appointed a committee of twelve Senators—six from each party—"to receive and to report evidence" on the articles of impeachment. *Id.* The Senate authorized the committee to submit a "certified copy of the transcript of the proceedings and testimony had and given before it," and to "report to the Senate a statement of facts . . . and a summary . . . of evidence that the

parties have introduced on the contested issues of fact." *Id.*

After denying Nixon's motion for trial before the full Senate (Imp. Rec., Pt. 1, at 319-21), the committee conducted the trial on four days in September. *Id.* Pt. 2. A quorum of seven Committee members was required to commence each session. Ten live witnesses testified, and the Committee received a large volume of written materials, including the record of Nixon's criminal trial, the post-conviction proceeding, and the House impeachment hearings. *Id.* Pts. 3, 4A (Vols. I and II), 4B (Vols. I, II, and III), and 4C.

Once again, former prosecutor Holmes was the principal accuser. Holmes admitted that he lied before the grand jury on three separate occasions. Imp. Rec., Comm. Report at 33. In House testimony, Holmes had repudiated both a sworn affidavit he had signed four months earlier, and sworn deposition testimony. Imp. Rec., Pt. 4B, Vol. 1 at 310-15 (1988). Before the Senate Committee, when asked which of his several conflicting sworn statements was true, Holmes replied, "You can use any one you want." Imp. Rec., Pt. 2 at 144.

The Senate Committee proceedings were transmitted by closed-circuit television to Senate offices and were videotaped for later review by any Senators so choosing. As the district court noted, however, "[t]he record is silent as to how many Senators took advantage of these opportunities to view the committee proceedings." *See* Pet. App. B, at 60a.

Following submission by the parties of proposed findings of fact, the Senate Committee issued a report purporting to summarize the trial evidence. Imp. Rec., Comm. Report. The report contained a critical warning:

> Many specific details—including some that are very important—about each of [three pivotal] conversations are disputed by the parties. Indeed, the com-

> mittee received dramatically inconsistent testimony concerning the substance, date, and result of these conversations from the participants in the conversations themselves . . . . Familiarity with these witnesses' various, and divergent, testimony concerning these three conversations is critical to obtaining an understanding of the parties' respective positions.

Pet. App. B, at 60a. That warning reflected a critical fact: the case against Nixon turned entirely on the question of witness credibility. Yet only the members of the Senate Committee—twelve of one hundred Senators—actually heard the testimony of Nixon and Holmes, and had an opportunity to scrutinize witness demeanor, tone of voice, facial expressions, and other factors necessary to determine who was telling the truth.

The report issued by the Senate Committee also erroneously omitted key passages of Nixon's criminal trial testimony and inaccurately claimed that Nixon's Senate testimony "contrasted" with his trial testimony. Imp. Rec., Comm. Report at 74. As Nixon argued to the Senate, these errors were especially damaging in light of the Committee's recognition that witness credibility was crucial. Accordingly, Nixon renewed his motion for trial on the Senate floor. Imp. Rec., Proceedings at 162 n.4.

On November 1, without seeing witnesses or hearing their testimony, the full Senate heard closing arguments. The President Pro Tempore then addressed to counsel written questions from individual Senators. The entire session lasted less than four hours. Imp. Rec., Proceedings at 357-422; 135 Cong. Rec. S14493-517 (daily ed. Nov. 1, 1989).

The Senate met in executive session for six hours on the following day, returning to vote on November 3. The Senate first voted 90-7 to deny Nixon's renewed motion for trial before the full Senate. Imp. Rec., Pro-

ceedings at 429-30; 135 Cong. Rec. S14634 (daily ed. Nov. 3, 1989). The Senate then voted to convict on Article I by a margin of 89-8, and on Article II on a vote of 78-19. The Senate acquitted on Article III. *Id.* at 432-34.

The two convictions were certified by the Secretary of the Senate and copies were deposited with defendant James A. Baker, U.S. Secretary of State. Respondent Ralph Mecham, Director of the Administrative Office of the United States Court, then directed the termination of Nixon's salary and benefits as a federal judge.

3. A Biased Procedure: Uninformed Senators Ordinarily Vote To Convict

Senators who did not serve on the Senate Committee, and who thus neither heard the evidence nor saw the witnesses, voted to convict Nixon in proportionately greater numbers than did the members of the Senate Committee:

—On Article I, 75% of the Senators who served on the Senate Committee voted to convict, while 94% of the remaining Senators did so;

—On Article II, only 58% of the Committee members voted to convict, while 84% of the remaining Senators did so;

—And on Article III, only 42% of the Committee members voted to convict, while 61% of the remaining Senators did so. *See* Pet. App. A, at 22a n.2.

As reflected in Appendix H to this Petition, the Senate vote on Nixon's impeachment repeated a disturbing pattern established in the 1986 impeachment of Judge Harry Claiborne and the 1989 impeachment of Judge Alcee Hastings: those eighty-eight Senators who do not serve on the impeachment committee, and thus neither hear the evidence nor see the witnsss, disproportionately

favor the prosecution. With respect to the Hastings and Nixon impeachments, the Senate voted on a total of eighteen impeachment Articles; on seventeen of those eighteen Articles, the Senators who actually heard the evidence supported the accused in significantly greater proportions than did the other Senators.[2]

This variation in votes between committee members and other Senators is not merely a statistical curiosity; as the district court acknowledged, it often reflects the difference between winning and losing. Of the ten impeachment articles on which Judges Hastings and Nixon were convicted, nine failed to attract a two-thirds majority of the trial committee members. *See* Pet. App. B, at 62a. On Article II against Nixon, only 58% of the committee members voted to convict. *See* Pet. App. A, at 23a n.3. If the prosecution had to carry two-thirds of the Senators who actually heard the evidence, Nixon would have been acquitted on Article II, and Judge Hastings would still sit on the federal bench.

4. Senate Impeachment Rule XI: Senators Avoid "Dreary" Trials

This case concerns only the third impeachment ever conducted by a Senate committee. Until 1986, the Senate conducted all impeachment trials on the Senate floor, in full view of all Senators. Of eleven impeachment trials held on the Senate floor, the accused prevailed seven times. *See* "Impeachment: Selected Materials," House Judiciary Committee Print, 93d Cong., 1st Sess. 682-88 (1973) [hereinafter cited as "Impeachment Materials"].

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[2] On the eighteenth Article (Article XVI against Judge Hastings), the committee members and non-committee members both voted unanimously to acquit. The votes described in Appendix H are reported in Imp. Rec., Proceedings at 432-36 (Nixon vote), and the Congressional Record (*see* 135 Cong. Rec. S13782-88 (daily ed. Oct. 20, 1989) (Hastings vote); 132 Cong. Rec. S15760-62 (daily ed. Oct. 9, 1986) (Claiborne vote).

In contrast, all three judges tried before a committee under Rule XI have been convicted.

As adopted, Senate Impeachment Rule XI provides that

> in the trial of any impeachment the Presiding officer of the Senate, upon the order of the Senate, shall appoint a committee of 12 Senators to receive evidence and take testimony at such times and places as the committee may determine. . . .
>
> The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

Sen. Imp. Rule XI, reprinted in Senate Manual, S. Doc. No. 1, 98th Cong., 2d Sess. 174 (1984); Pet. App. G, at 87a.

The Senate adopted the current version of Rule XI in 1935. The rule's sponsor, Senator Ashurst, later explained that the impeachment trial of Judge Harold Louderback of New York had been "dreary, involved, and protracted," 80 Cong. Rec. 3425 (1936), and that "at least forty" Senators had urged the Judiciary Committee to find a less onerous method for trying impeachments. *Id.* Rule XI was the result. *Id.* Yet even prior to its adoption, several Senators had expressed concern that the committee procedure did not comply with the Senate trial requirement of the Constitution. *See, e.g.*, 78 Cong. Rec. 9928-29 (1934) (Senator Borah); 56 Cong. Rec. 698-99 (1912) (Senator Bailey).

One year after its adoption, moreover, the Senate declined to invoke the rule to try District Judge Halsted Ritter on articles of impeachment. At that time, the constitutionality of the rule was again questioned. *See, e.g.*, 80 Cong. Rec. 3425 (1936) (Senator Austin). To allay these concerns, Senator Ashurst described the new rule as applying only with the consent of the accused. Thus, he assured the Senate that the committee procedure should only be invoked "if and when the respondent was willing thus to have the testimony taken by a committee and the managers also were thus willing." *Id.* at 3425-26.

In the three impeachments over the last five years, that assurance has not been honored. In 1986, the Senate denied the request of Judge Claiborne for an impeachment trial before the Senate, and it did the same for Judges Hastings and Nixon in 1989.

5. Proceedings Below

On June 1, 1989, Judge Hastings filed an action against the Senate and several Senate employees, raising eleven challenges to the impeachment procedings against him. Judge Nixon intervened, solely to challenge the committee trial procedure as violating Art. I, § 3, cl. 6 of the Constitution. The district court dismissed the action. *Hastings v. United States Senate*, 716 F. Supp. 38 (D.D.C. 1989), (Pet. App. C, at 70a-78a), *aff'd mem.*, 887 F.2d 332 (D.C. Cir. 1989). The court of appeals affirmed on the single ground that the action was premature, since neither plaintiff had yet been convicted by the Senate or removed from office. *Hastings v. United States Senate*, No. 89-5188 (D.C. Cir. 1989) (Pet. App. D, at 79a-82a).

Following his conviction by the Senate in November 1989, Nixon brought this declaratory action against the United States and the executive and judicial officers who implemented his removal from office. Ruling on the par-

ties' cross-motions for summary judgment, the district court expressed considerable agreement with Nixon's constitutional claim, but nevertheless held the action nonjusticiable. *See* Pet. App. B.

The court of appeals affirmed, with the panel writing three different opinions. The opinion for the court by Judge Williams held that the case presented a nonjusticiable political question and did not reach the merits of petitioner's constitutional claim. Judge Williams wrote that since the Framers selected the Senate over the Supreme Court to conduct impeachment trials, they must have intended for the courts to be powerless in any case concerning impeachments. Judge Williams distinguished *Powell v. McCormack*, 395 U.S. 486 (1969), by noting that the House of Representatives in that case had exceeded an express textual limitation on its authority to judge the qualifications of its members.

A concurring opinion by Judge Randolph expressed doubt that the political question doctrine applied. Nevertheless, Judge Randolph held that since the courts were not identified in the Constitution as having any authority over impeachments, they are not empowered to review any aspect of impeachment proceedings.

Judge Edwards sharply disagreed with his colleagues on justiciability, finding the political question doctrine inapplicable. Pointing to this Court's decision in *Powell*, Judge Edwards wrote, "[i]t is the court's task to interpret and give content to the word 'try' [in the Impeachment Clause], just as it was the Court's job in *Powell* to give meaning to the word 'Qualifications'" in Article I, § 5. Pet. App. A, at 34a. Judge Edwards went on to conclude, however, that trial by committee "can be accommodated" within the Impeachment Clause. *Id.* at 48a.

Petitioner filed a timely petition for rehearing, which was denied on August 5, 1991. Pet. App. E, at 83a.

REASONS FOR ALLOWING THE WRIT

The impeachment process involves the most fundamental confrontations among the coordinate branches of government. Through impeachment, Congress retains the ultimate power to remove judges and executive officials who prove irresponsible, unworthy, or despotic. But, always sensitive to the need to impose checks and balances on such ultimate power, the Framers deliberately established a cumbersome and unwieldy impeachment process that requires action by both Houses of Congress, a Senate trial, and a two-thirds vote. If Congress could remove a judge easily, the independence of the federal judiciary would be fatally compromised. If presidential and executive impeachments were uncomplicated, legislative tyranny could result.

This case presents the question whether the Senate can defeat this constitutional balance by unilaterally streamlining an impeachment process that was intended to be "dreary" and "protracted." Nor will this streamlining necessarily stop with Rule XI. In fact, the Senate in this case maintained below that it can conduct an impeachment trial without a single Senator hearing a single witness, arguing that it may "try an impeachment based upon a written evidentiary record created through full and fair adversary proceedings." [3] The Court thus should review this case to consider (1) whether the Senate's violation of the Impeachment Clause is insulated from court review, and (2) whether use of the biased procedure of trial by committee satisfies the command that the Senate "try all Impeachments."

1. Article I, § 3, cl. 6 of the Constitution provides that "The Senate shall have the sole Power to try all Impeachments." This provision empowers the Senate alone to con-

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[3] Memorandum to the District Court of the United States Senate As Amicus Curiae In Support Of Judgment For Defendant (March 28, 1990), at 54.

duct impeachment trials, but the discretion afforded the Senate is not unlimited. The Senate must act under oath, it cannot remove from office without a two-thirds majority, and it must adhere to the express requirement that it "try all Impeachments." If the Senate does not meet these specific requirements, the courts must enforce the literal terms of the Constitution.

The lower courts' refusal to decide the constitutional issue presented here directly conflicts with *Powell v. McCormack* and *INS v. Chadha*, 462 U.S. 919 (1983), which define the limits of the political question doctrine and principles of justiciability. While the Senate has "sole power" to try impeachments, the court of appeals erroneously construed that power to preclude judicial review of violations of the Impeachment Clause. The phrase "sole power" surely bars trial of impeachments by any entity other than the Senate, thereby settling a dispute at the Constitutional Convention over whether the courts should conduct impeachment trials. But the Senate's sole power to try the case does not bar judicial review in the narrow category of cases involving whether the Senate has complied with express constitutional requirements. What if the Senate purported to remove a judge by a simple majority vote rather than a two-thirds majority? Or if the Senate refused to permit the Chief Justice to preside at a presidential impeachment? Violations of the Impeachment Clause itself must be reviewed by the courts.

2. The Senate must "try all Impeachments." Art. I, § 3, cl. 6. To "try" a case, according to the ordinary meaning of the word, necessarily means that the trier hear and see the evidence. The Framers' use of the term "try" reflects the intent that the Senate, and not some fraction of the Senate, shall be the trier and thus conduct the trial itself. Only a trial by the Senate, moreover, is consistent with the Framers' goal of a "numerous" impeachment court that would protect the independence of

the judiciary. Indeed, trial by committee is an unconstitutional shortcut that is sharply biased against the accused. Finally, the most authoritative construction of that phrase is the Senate's practice until 1986 of conducting impeachment trials on the Senate floor, as part of the regular business of the Senate.

I. VIOLATIONS OF THE IMPEACHMENT CLAUSE ARE JUSTICIABLE

Under the majority opinions below, the federal courts do not have the power to "say what the law is" under the Impeachment Clause. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). That broad conclusion can dangerously inflate an ultimate legislative power that is readily subject to abuse. Although the Senate's power over impeachment trials may be plenary, it is not absolute; the Constitution remains a check on that power, and the courts must restrain its exercise within constitutional limits. *See Oneida v. Oneida Indian Nation*, 470 U.S. 226, 249 (1985); *cf. Buckley v. Valeo*, 424 U.S. 1, 132 (1976).

According to the court of appeals, the Senate's authority to try impeachments amounts to a "textually demonstrable constitutional commitment" of the issue which, along with the "need for finality," requires application of the political question doctrine. *Cf. Baker v. Carr*, 369 U.S. 186, 217 (1962). This conclusion, however, directly conflicts with *Powell v. McCormack*, 395 U.S. 486 (1969).

Powell concerned a challenge to the authority of the House of Representatives to "Judge . . . the Elections, Returns and Qualifications of its own Members." Art. I, § 5, cl. 1. The Court concluded that the Framers intended to restrict the qualifications that the House could "judge" to the standing requirements enumerated in Art. I, § 2, cl. 2. Thus, even though the Constitution establishes a "demonstrable textual commitment" to the House of the power to judge its members' qualifications, the courts retain the power to determine whether House ac-

tion to exclude a Member exceeded constitutional limits. 395 U.S. at 548.

Under *Powell*, even where the constitutional text plainly assigns a power to Congress, courts must review claims that Congress has exceeded an express limitation on that power. *See also Morgan v. United States*, 801 F.2d 445, 448 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 911 (1987) (judicial review in Powell authorized because "House action in question did *not* consist of judging 'qualifications' within the meaning of the provision") (emphasis in original).[4] Courts must interpret the constitutional text to determine the limits of the power conferred upon the Congress, and then review whether congressional action compiled with those limits. That is all that Nixon seeks here.

INS v. Chadha, 462 U.S. 919 (1983), further demonstrates that the political question doctrine is no bar to judicial review here. *Chadha* squarely rejected the contention that congressional action could not be challenged in the courts because Congress had taken the action pursuant to a constitutional grant of power: "The plenary authority of Congress . . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power." *Id.* at 941. Finding a political question in such circumstances would mean that "virtually every challenge

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[4] In *Morgan*, a group of private citizens challenged the determination of the House of Representatives that one of two candidates competing to represent an Indiana congressional district was lawfully elected to that body. The court of appeals ruled that the Constitution made plain the authority of the House to be "*the* Judge" of the elections of its members, 801 F.2d at 447 (emphasis in original), and thus that the court "simply lack[ed] jurisdiction to proceed." *Id.* In so ruling, however, the court specifically disclaimed reliance on the "amorphous and partly prudential doctrine of 'political questions,'" *id.*, and emphasized that its holding "does not, of course, preclude all judicial challenges bearing any relationship to legislative resolution of disputed elections. It is conceivable, for example, that in investigating such a dispute a House might go beyond its constitutional power to compel witnesses." *Id.* at 451.

to the constitutionality of a statute would be a political question" and thus the courts would be unable to perform the role assigned to them in the Constitution. *Id.*

In considering whether there is a "textual commitment" strong enough to preclude all judicial review, the court of appeals fastened on the phrase that the Senate has "sole power" to try impeachments. Judge Williams cited a 1936 Claims Court case for the proposition that the "sole power" phrase means that "the Senate should act without any other tribunal having anything to do with the case." Pet. App. A, at 4a.[5] But this reasoning leads to the indefensible result that courts could not intervene to enforce the Constitution under any circumstances—even when the trial is based entirely on a written record (as the Senate argued), or is conducted before a group of schoolchildren (as Judge Williams acknowledged). Pet. App. A, at 14a. The inconsistency of this reasoning is highlighted by Judge Williams' concession that at least some constitutional limitations on the Senate's impeachment trial powers could be enforced by the courts. Pet. App. A, at 15a n.2.

As explained more fully in Section II below, the Framers intended that the Senate, as opposed to the Supreme

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[5] The Claims Court case is *Ritter v. United States*, 84 Ct. Cl. 293, 296 (1936), *cert. denied*, 300 U.S. 668 (1937), which held that the court had no authority to determine whether any of the articles of impeachment on which plaintiff had been convicted charged impeachable offenses, or whether the Senate could try him on an article which incorporated allegations contained in other articles on which plaintiff had been acquitted. No challenge was presented there to the Senate's "trial by committee" procedure. Moreover, to the extent the *Ritter* dictum that "no other tribunal should have any jurisdiction of the cases tried under the provisions with reference to impeachment" means that the judiciary cannot review any aspect of congressional impeachment proceedings, that dictum cannot be squared with this Court's later ruling in *Powell v. McCormack*, 395 U.S. 486 (1969). Nor, as discussed *infra* in text, is that dictum consistent with Judge Williams' ultimate concession that at least some congressional transgressions under the Impeachment Clause are reviewable by the courts. *See* Pet. App. A, at 15a n.2.

Court, should have the "sole power" to try impeachments. *See infra* at 21-23. But nothing in the text or history of the Constitution suggests that the Framers intended that the Senate's failure to comply with the express terms of the Impeachment Clause should be uniquely insulated from court review.

That the challenged impeachment procedures are embodied in a Senate rule, adopted under its rulemaking power in Art. I, § 5, cl. 2 of the Constitution, does not change this result. Congressional rules are not exempt from judicial review because they are authorized by the Constitution, and the requirement that they comply with the Constitution is not lessened because they govern "internal" procedures only. *See United States v. Ballin*, 144 U.S. 1, 5 (1892) (although Constitution empowers each House to determine its rules, Congress "may not by its rules ignore constitutional restraints or violate fundamental rights"); *see also Morgan*, 801 F.2d at 449-50 ("Authorization to determine rules of proceedings does not inevitably exclude review of the lawfulness of those rules.").[6]

Judge Randolph's suggestion that review of Nixon's claim would open the "floodgates" of impeachment litiga-

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[6] In support of its rules clause argument, the court of appeals cited a previous case from the same circuit, *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983). But *Vander Jagt* strongly supports review here. Fourteen members of the House of Representatives sued the House Leadership over an alleged "systematic discrimination" against them with respect to committee assignments. The court of appeals expressly rejected a political question defense based on congressional action under Art. I § 5, cl. 2. According to the court there, "Article I simply means that neither we nor the Executive Branch may tell Congress what rules it must adopt. Article I does not alter our judicial responsibility to say what rules Congress may not adopt because of constitutional infirmity." *Id.* at 1173. Although the court made clear that the political question doctrine presented no obstacle to judicial review, *id.* at 1173-74, 1177, it ultimately declined to award relief because the case was "essentially a suit by some members of Congress against others." *Id.* at 1175.

tion, and Judge Williams' desire to ensure "finality," are similarly without force. *See* Pet. App. A, at 13a, 16a-17a. A court decision applying the express terms of the Impeachment Clause need not lead to endless litigation any more than *Powell v. McCormack* has submerged the courts in disputes over congressional qualifications. If an express constitutional limitation is violated, judicial review must be available. Equally, this Court has made clear that justiciability cannot turn on speculative predictions such as whether future impeachment trial challenges might arise. Pet. App. A, at 13a; *see also id.* at 14a-15a (Randolph, J., concurring). In *Davis v. Bandemer*, 478 U.S. 109 (1986), the Court declined to focus justiciability analysis on "such amorphous and wide-ranging factors . . . [as] the potential practical problems with allowing [judicial] review" because it would "alter substantially the analysis in *Baker v. Carr*." *Id.* at 126-27.

Nor is it an acceptable response, when one branch violates a clear constitutional limit on its power, to say, as did Judge Williams, that the nation's only recourse is at the ballot box. Pet. App. A, at 15a. Neither may courts merely throw up their hands when confronted with the possibility of extreme constitutional transgressions, lamenting that in those circumstances "the republic will have sunk to such depths [that] no court could rescue it." *Id.* at 14a-15a. That position is antithetical to the concept of judicial review, and constitutes an abandonment of the courts' responsibility under the Constitution.

By abdicating its responsibility to "try" impeachments, the Senate overstepped its powers in the critical balance between the coordinate branches struck by the Impeachment Clause. Such a constitutional violation is fully reviewable by the courts. This conclusion is powerfully reinforced by the critical importance of the core constitutional values that hang in the balance here: by unilaterally changing the impeachment procedure prescribed by the Constitution, the Senate has arrogated to itself

greater power over the executive and the judiciary, to be exercised with less care.

II. TRIAL BY COMMITTEE IS UNCONSTITUTIONAL

The Constitution explicitly commands that the "Senate shall have the sole Power to try all Impeachments." Although the Senate is the only entity that may try impeachments—it has "sole power" to do so—there is no ambiguity in the constitutional direction that the Senate itself must actually perform this task. In this case, however, the Senate refused this command, and subjected Nixon to a constitutionally deficient procedure.

The question of the constitutionality of committee trials was briefed and argued below, and is ripe for decision. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984); *cf. Ramsey v. United Mine Workers*, 401 U.S. 302, 312-13 (1971). Moreover, Judge Edwards specifically addressed the constitutionality of the committee trial procedure, and approved it on the grounds that (1) the Framers intended that impeachment trials be conducted with "greater procedural flexibility" than criminal trials, Pet. App. A, at 47a, and (2) early Seventeenth Century precedent from England "may be read to suggest that the Framers did not intend to foreclose the possibility [of using impeachment committees] in American constitutional practice." *Id.* at 36a. Neither argument, however, can overcome the clear command of the Constitution that the Senate try all impeachments, especially since an impeachment trial by committee is inherently and demonstrably unfair to the accused.

A. Constitutional Text

Article I, section 3, clause 6 of the Constitution provides that the Senate shall "try all Impeachments." By using the term "try," the Constitution directs the Senate to conduct the trial—including the taking of evidence and the hearing of testimony—and not merely to vote.

The Impeachment Clause does not give the Senate the power to "judge" impeachments; it requires the Senate to "try" them. The distinction is critical, and demonstrates that the Framers intended the Senate to do more than merely render "independent final judgment" in executing their impeachment trial responsibilities. *Cf. Roudebush v. Hartke*, 405 U.S. 15, 25 (1972). Nor does the Impeachment Clause use verbs such as "review," "vote on," or "convict," which might suggest that the Senate need not actually conduct impeachment trials by hearing evidence and reaching judgment. Indeed, the term "try" does not have a radically different meaning today than it did when the Constitution was drafted; one 1780 dictionary defined "to try" as, *inter alia*, "to examine as a judge; to bring before a judicial tribunal." T. Sheridan, *A Dictionary of The English Language* (1780); *compare Black's Law Dictionary*, 1358 (5th ed. 1979) ("to try" means "[t]o examine judicially. To examine and investigate a controversy by the legal method called 'trial' for the purpose of determining the issues it involves.").

This interpretation of "try" is reinforced by those other constitutional provisions that employ that term and its cognates. Thus, Article III directs that the "Trial of all Crimes, except in Cases of Impeachment, shall be by jury . . . ." Art III, § 2, cl. 3. That provision certainly contemplates that the jury shall try the case by hearing the evidence, not by appointing a committee of two or three jurors to hear witnesses and prepare a written report for the other jurors. Similarly, the Seventh Amendment describes both "trial by jury" and facts "*tried* by a jury" (emphasis added). The latter phrase plainly reflects the understanding that a fact or a case may be "tried" only when it is received as a jury would receive it: through observation of live testimony.[7]

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[7] The opinion of the trial court below underscores this point. According to the court, "[t]here are significant differences between

The structure of the Impeachment Clause further supports the conclusion that committee trials violate the Constitution. The Clause describes the Senate "sitting" for the purpose of trying articles of impeachment, just as judge and jury would "sit" at trial—hearing witnesses and weighing evidence. *See* Art. I, § 3, cl. 6. Senators are also to be under "Oath or Affirmation" during the proceedings, as is a jury sitting at trial. *Id.* And when the President "is tried" on articles of impeachment, the Chief Justice is to preside. Surely the Chief Justice was not expected to preside over a committee of twelve, but rather over the full Senate in trying the impeachment. *Id.*[8]

B. The Constitutional Debates

The deliberations of the Framers are entirely consistent with the plain meaning of the text that the Senate itself must try the impeachment case. Above all, the Framers wanted an impeachment process that would guard the independence of the judiciary and the Executive, and that would not grant arbitrary power to Congress. In explaining the need for life tenure of judges, Madison argued that if federal judges had to be reappointed, they "might be tempted to cultivate the Legislature, by undue complaisance, and thus render the Legislature the virtual expositor, as well as the maker of the

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the consideration given to a matter by triers of fact who confront live witnesses and those who view the testimony secondhand in a transcript or from oral or video tape. This difference is reflected in the Seventh Amendment's limitation on trial and appellate court review or re-examination of a 'fact tried by a jury.'" Pet. App. B, at 65a.

[8] The trial court, after considering the constitutional text, concluded that "[t]here are thus strong contextual indications that if the Framers could speak today, they might well say that they intended impeachments to be tried to the Senate, sitting as a court on questions of law and as jurors on questions of fact." Pet. App. B, at 64a.

laws." 2 M. Farrand, *Records of the Federal Convention* at 34 (Sept. 8, 1787) (hereinafter *"Convention Records"*). Hamilton agreed that the independence of the judiciary was a paramount value, arguing that "all possible care is requisite to enable it to defend itself against [the other branches'] attacks." *The Federalist* No. 78, at 504 (E. Earle ed. 1937).

To the Framers, this paramount value could be preserved only if impeachment were a burdensome and time-consuming process. Thus, the delegates rejected a proposal by John Dickinson that federal judges be removed by majority vote of either the House or Senate, without a trial. *See Convention Records*, at 428. The Dickinson proposal, modeled after the English practice of removal by "address," was rejected because it would "weaken[] too much the independence of the Judges." *Id.* at 428-29 (remarks of E. Randolph).

Instead, the Framers chose the two-step impeachment process, in which the House impeaches and the Senate tries, with conviction in the Senate by a two-thirds majority. According to Hamilton, this cumbersome procedure is "the only provision [for the removal of judges] which is consistent with the necessary independence of the judicial character." *The Federalist* No. 79, at 514; *see also The Federalist* No. 66, at 430.

The Framers also insisted that impeachment trials be conducted before a "numerous" body. Because of the significance and volatility of impeachments, which involve head-on clashes between branches of government, impeachment trials must be conducted by a body of sufficient public stature to reconcile the public to potentially unpopular decisions. Yet the Framers refused to assign impeachment trials to the Supreme Court specifically because it was "too few in number." *Convention Records*, at 551 (G. Morris commenting on Madison's proposal for Supreme Court to conduct impeachment trials). Hamilton explained why:

> There will be no jury to stand between the judges who are to pronounce the sentence of the law, and the party who is to receive or suffer it. The awful discretion which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.

The Federalist, No. 65, at 426. Thus, the numerous Senate was the only tribunal that could be trusted to reach the correct decision, *see Convention Records*, at 551 (remarks of G. Morris), even though "reasonable attention to economy" might argue for the conduct of impeachment trials by a less numerous body. *The Federalist* No. 65, at 425. *See also id.* No. 66, at 434 (Senate to be "a court of impeachments"); *id.* No. 65, at 423 (Constitution allots to Senate power of a "judicial character as a court for the trial of impeachments").

Perhaps the most persuasive evidence on the meaning of the Impeachment Clause is the most obvious: What did the Senate do in the first impeachments? Did the Senate, while the Framers still lived and participated in our public life, conduct impeachment trials by committee, or before the full Senate? The answer is unambiguous. Through eleven impeachment trials until 1986, the Senate truly discharged its constitutional obligation to conduct impeachment trials before the Senate itself.[9]

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[9] For this reason, Judge Edwards' reliance on Jefferson's Manual of Parliamentary Practice is misplaced. *See* Pet. App. A, at 52a. Although Jefferson noted in his Manual that committees had been used for evidence-gathering purposes in England, *id.*, the Senate, during the period contemporaneous with the lives of the Framers—including the period during which Jefferson presided over the Senate as Vice President—never once used the committee procedure to try impeachments. Nor does it appear that committees were used in the many impeachment trials conducted by the colonial governments and the new states at the time the Constitution was drafted. *See* P. Hoffer and N. Hull, *Impeachment in America, 1635-1805*, at 78-95, 116-45, 164-77 (1984).

In the face of this evidence, trial by committee cannot be upheld on the theory that the Framers intended such trials to be allowed "greater procedural flexibility" than in the criminal context. The question here is not whether or by how much the impeachment trial should resemble a criminal proceeding. The question is whether the Constitution specifically requires that there be an impeachment trial by the Senate. Nor is the committee procedure authorized by the apparent use of committees to conduct evidentiary proceedings in certain English impeachments in the early 1600's. If the Framers had wished impeachment trials to be by committee, surely they would have said so, or their contemporaries would have done so in the first impeachments. Instead, the Framers prescribed a formal and deliberate impeachment trial, and they specifically rejected a proposal that would permit the removal of judges upon a majority vote by the legislature. *See supra* at 22. Thus it should not be surprising that impeachment trial by committee, to the extent such a procedure may have been used in England in the early Seventeenth Century, was not accepted in this country.

Ultimately, Judge Edwards resorted to "common sense" reasoning to justify his conclusion: if the Senate could try petitioner on the Senate floor with less than twelve Senators present, he contended, then surely it should be able to "try" petitioner by committee. Pet. App. A, at 56a-57a. But that argument rests on a false premise; the Constitution expressly requires the presence of a quorum of the Senate, now 51 members, for the Senate to conduct its business. Art. I, § 5, cl. 1. And the point is also of no constitutional significance. Whether some individual Senators might fail to attend trial proceedings conducted on the Senate floor cannot legitimate a committee procedure that conflicts with the express command of the Constitution.

C. Impeachment Trial by Committee Is Inherently Unfair

The committee trial procedure is inherently and demonstrably unfair to the accused—a fact confirmed by the voting patterns in the Claiborne, Hastings, and Nixon impeachments. *See supra* at 7-8; Appendix H. Of the ten impeachment articles on which Judges Hastings and Nixon were convicted, nine failed to attract a two-thirds majority of the committee members. Pet. App. B, at 62a.

The reasons for this bias are plain. First, credibility issues lay at the heart of the case here. But credibility issues cannot responsibly be decided by a jury that never hears or sees the witnesses.[10] Nor is a committee summary of the evidence an adequate substitute for hearing and seeing the witnesses, even assuming such a summary is read. *Cf.* Pet. App. B, at 60a. In this case, the Senate Committee report omitted important passages of Nixon's trial testimony and inaccurately reported that Nixon's Senate testimony "contrasted" with his trial testimony. *See supra* at 6. These errors would not have occurred had petitioner's impeachment trial been conducted before the Senate as required by the Constitution.

In cases in which a criminal conviction precedes impeachment trial, moreover, those Senators not on the impeachment committee inevitably will defer to the jury verdict in reaching their decisions. In this case, Senator Levin stated as much:

> Would we be here but for Judge Nixon's conviction? I doubt it, since there is a reasonably supportable, benign explanation of his testimony before the grand jury. But . . . Judge Nixon was

[10] A number of Senators have criticized the committee trial procedure for this reason. *See, e.g.*, 132 Cong. Rec. S16823 (daily ed. Oct. 16, 1986) (remarks of Sen. Levin regarding Claiborne impeachment); *id.* at S15762 (remarks of Sen. Bingaman regarding Claiborne impeachment); *id.* at S16821 (remarks of Sen. Evans regarding Claiborne impeachment).

> convicted of perjury based on the very same statements before us in this impeachment proceeding. . . . The practice of factfinders relying on findings made in other legal proceedings is called collateral estoppel and is a long-standing well-established principle of American law. I believe it is particularly appropriate for us to use that doctrine in the matter of Judge Nixon, *because of the Senate's refusal to allow him to conduct any impeachment trial before the full Senate. Because most of us were not members of the Senate committee that heard the evidence in this matter and were not present to evaluate the demeanor of the witnesses, we are at a disadvantage in making the factual findings required by this proceeding.*

Imp. Rec., Proceedings at 444-45 (emphasis added).

Such deference to prior criminal proceedings directly undercuts the design of the Constitution in providing an impeachment trial separate from the criminal trial. Impeachment becomes easy, judicial independence is sapped, and the constitutional balance of power is changed forever. Instead of the cumbersome, deliberate process prescribed in the Impeachment Clause, trial by committee results in a process that closely resembles John Dickinson's rejected proposal that judges be removed by "address," through legislative vote without a trial. *See supra* at 22. For the eighty-eight Senators who never heard or saw the trial, Nixon's removal from office thus effectively was achieved by a procedure rejected by the Framers. This Court cannot ignore this rewriting of the Constitution by the Senate.

CONCLUSION

For all of the foregoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the questions raised in this petition.

Respectfully submitted,

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